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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1944.

THE WALLACE CORPORATION,
Petitioner,
vs.
NATIONAL LABOR RELATIONS BOARD.

No. 66.

PETITIONER'S REPLY BRIEF.

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I.

THE PRESENT STATE OF THE ISSUES.

It is notable that the Board has progressively receded from the position which it first took in this case:

Admission No. 1. After the reargument before the Board, the Board admitted that there was no breach of the settlement or election agreements by the employer prior to the election (R. 24). It retreated to the position that the making of the closed shop contract itself, after

the election, was the only unfair practice. Here the Board is squarely up against its own prior action, namely, that the Board had by its certification, required the employer to negotiate with the Independent. The Board itself had participated in the settlement agreement whereby the employer was obligated to make the closed shop contract of which the Board now complains.

Admission No. 2. In its brief before the Court of Appeals, the Board admitted, with respect to the discharge of these employees, that there was no conspiracy between the Independent and the employer in respect to the discharge. The court took notice of this admission on the part of the Board when it said:

> "It would not be fair to the company to say that it conspired with the Independent union to bring about the discharge of troublesome members of the opposite union." (R. 350).

This admission places the Board in great extremity, because, if the discrimination here involved was the sole act of the Independent union and not the act of the employer, the employer cannot be held for unfair practice. As shown below, the Board still argues this case in language which insinuates participation by the company in the discriminatory exclusion by the union, when in fact all the evidence is to the contrary.

Admission No. 3. In its present brief the Board has admitted that a union has control of its own admission policies to the exclusion of interference by the employer.

The Board admits that the courts have never supervised admission policies of unions and cites only one case as casting even any doubt on that question. This is the case of **Cameron v. International Alliance** (1935), 118 N. J. Eq. 11; 176 Atl. 692, where a union's constitution and by-laws were held invalid at the suit of junior mem-

bers of the union, for the reason that junior members could not be bound by a contract which unduly limited their right to dispose of their labor as they pleased. The case has been recognized as a borderline case. See Notes, 19 Minn. Law Review 818. Furthermore, as pointed out by the petitioner in its brief, the case turned on the union's monopoly of labor which there existed, a doctrine since abandoned by the New Jersey courts (Pet. Br. pp. 64, 65).

But the overwhelming authority is that the courts should not interfere in such matters and the Board has itself adopted the same policy. Professor Ralph A. Newman, a former examiner for the Board, in his article on "The Closed Union and the Right to Work," in 43 Columbia Law. Review 42, l. c. 51, says:

> "Control of the rules of admission to labor unions can not be accomplished through the National Labor Relations Act, since according to its terms it is limited to the correction of unfair practices on the part of the employer only. Indeed, the N. L. R. B. since its early history has expressly adopted a hands-off policy as to the internal affairs of labor unions."

The very first annual report of the Board, at page 109, adopted a similar position with respect to jurisdictional disputes between unions and said the following:

> "Self organization of employees implies a policy of self management. The role that organizations of employees eventually must play in the structure established by Congress through that Act is a large and vital one. They will best be able to perform that role if they are permitted freely to work out the solutions of their own internal problems. In its permanent operations the Act envisages cohesive organizations well constructed and intelligently guided."

The point is, we believe, too clear for further argument. And in any case, even if it should be held that the Board

may indirectly supervise unions by denying them privileges under the Act, it certainly would be a departure from the policy of the Act to permit, let alone insist, that an employer should take a position other than a neutral one in such controversies.

II.

THE BOARD FAILS TO MEET AN IMPORTANT ISSUE OF LAW.

The petitioner invites attention to the failure of the Board to meet one vital point of law raised in petitioner's brief, namely, that even if the action of a union in excluding employees from membership is wrongful, the employer cannot be held liable or charged with the duty of reforming the union. Many cases were cited to support this conclusion in Petitioner's brief (pp. 68 to 75). It is an especially important principle where an employer is caught between two rival unions. If there are evils in union practices certainly the employer should not be charged with the task of purifying unionism from such practices.

III.

THE BOARD'S NOVEL ARGUMENT ON CONSTRUCTION OF THE CLOSED SHOP PROVISO.

Neither the closed shop contract in this case nor anything in the wording or policy of the National Labor Relations Act conditions a closed shop upon an open union.

The closed or union shop contract in this case provided: "The company agrees that all of its employees * * * shall be members of the union in good standing" (R. 61, 62). This is an agreement of the company to employ only union members. It does not mean that the union agrees that all the employees of the company shall be members. Can there be any doubt that if an employee of the

company ceased to be a member of a union, then the clause would operate? It operates if an employee does not join. It operates if an employee ceases to be in good standing. It operates if the union expels him. Why should it not operate if the union excludes him in the first place? The clause of the contract conspicuously omits any agreement of the union to admit all employees of the company.

The Board makes a novel argument that the closed shop proviso of the Act permits a union to require everyone to join its union but negatives any notion that the union may exclude employees. The Board's suggestion would redraft the proviso to read: "Nothing in this act shall prohibit a union by agreement with the employer from requiring all the employees to join its union." The proviso does not so read. The subject of the proviso is the employer and the proviso says that an employer may make an agreement with the labor organization requiring as a condition of employment membership therein. A labor union does not prescribe a condition of employment; the employer does the employing. The labor union prescribes membership and the terms upon which membership may be permitted.

The fact that this construction is correct is borne out by the statutory provisions cited in petitioner's brief which supplements the proviso by limiting the right of the union to exclude. The suggested construction by the Board is indeed strained.

The proviso is part of Section 8, which defines unfair labor practices of an **employer** in the first and controlling sentence. It is the action of the employer which is regulated. The reason for the **proviso** is to free the employer from any charge of encouraging membership when he makes membership a condition of employment.

It should be further noted that only **agreements** are permitted. An employer still cannot require an employee to join a union or refrain from joining a union, absent an

agreement. It follows that he cannot insist that a union admit his employees. Furthermore, the first definition of unfair labor practice in Section 8 precludes an employer from interfering with the rights of self-organization or the formation of unions. An employer may not interfere with self-organization by employees or the formation of a union. It follows that he has no right to interfere in prescribing admission policies.

We have never heard it questioned that the Act is designed to encourage collective bargaining. The mandate of the Act requires the Board to encourage collective bargaining. Section 1 declares the purpose of protecting the exercise of full freedom of association. It declares the purpose of encouraging collective bargaining. Section 9-C representation directs the Board in representation matters to determine the unit according to whether the unit will insure to employees the full benefit of their right to self-organization. Last, but not least, the remedies of the Act are directed only against unfair labor practices, and the only person who can commit unfair labor practices as defined by the Act is an employer.

Majority Rule. The Board relies much upon the majority rule. It refers, without citation, to the solicitude of Congress for the minority. Perhaps some members of Congress were solicitous about the minority, but they did not prevail. The Congress resolved the question by providing that the representatives of the majority exclusively should do the bargaining, and we believe that conclusion is generally accepted as correct as far as representation is concerned. As a matter of fact, the only thing Congress did for the minority was to insert a proviso in Section 9-A that "any individual employee or group of employees shall have the right at any time to present grievances to their employer."

We think the answer is too obvious for further argument. The Act was intended to encourage unionism, not to place

limitations upon unionism. We do not quarrel with that conclusion—we only insist upon an honest recognition of it.

Minority Right to Representation. The Board cites, with approval, the opinion of Judge Groner in the "Red Cap" case, **Brotherhood of Railway and Steamship Clerks etc. v. United Transport Service Employees of America** (App. D. C.), 137 Fed. (2d) 847. The union had no right to exclude in that case, because there was no closed shop agreement; so the minority were included in the class or craft. Since the statute gave all employees the right to choose representatives, the minority could not be excluded from the right by arbitrary exclusion from the union. The Court's answer was simple. The minority union should be recognized.

But in the National Labor Relations Act, we have a provision which is absent in the Railway Labor Act: The closed shop proviso, as all agree, permits the exclusion of non-members of the union from the **unit** and from **employment**. The employees are therefore excluded from the very relationship which gives rise to the right of representation. If the argument of the board falls as to the right of representation, it falls alike as to employees who do not choose to join and those who are excluded from membership in the union, for any of the many reasons which might justify such exclusion, including as we contend, adherence to a rival or hostile union.

The Board admits that Congress left to the States the question of the legality of the closed shop. That is not to be doubted. It would seem to follow that the right of the union to exclude should be a matter of state legislation, until the Congress decides to amplify its own definition.

The political analogies suggested by the Board are dangerous. Industrial democracy has not grown apace with political democracy. With recognition and representation only just secured, we cannot expect that the first act which

secures those collective rights, should also contain a bill of rights for the individual and for the minority. We would hope that such a bill of rights would be careful and discriminating. But of one thing we are sure; namely, that if and when the time comes to fashion the rights of the minority and the specifications for the open union, then and in that event, the National Labor Relations Board will be the last to suggest as it does in this case, that it is up to the employer to administer and enforce such rights.

We applaud the suggestion of the Board that unions should be held accountable for their acts. The notion of accountability of the majority to the minority, however, is one which arises only after the membership relationship is established. The notion of trusteeship arises only where the minority are members. The right of a union to exclude under its by-laws is, as above indicated, not limited by the closed shop clause. It is a contradiction in terms to say that a union represents employees who are excluded from the unit by a closed shop agreement.

The authorities which are cited by the Board to indicate that a union may be held accountable and responsible do not touch the question at issue. There is no doubt that unions are bound by the law of the land in many respects. For example, a strike for a closed shop may be enjoined in Massachusetts and Pennsylvania, even though closed shop agreements are valid there. **Erdman v. Mitchell** (1903), 207 Pa. 79, 56 Atl. 327; **Fashioncraft v. Halpern** (1943), 48 N. E. (2d) 1. Unions are bound by many other principles of law.

The cases cited by the Board discussed below are not authority in any particular against the well recognized rule that the Act does not attempt to regulate the affairs of a union. Clearly the cases are not authority for the Board's contention that the Independent, in excluding from membership the employees here involved, deprived the petitioner of the immunity granted it under Section 8 (3) of the Act.

In the matter of **American News Co., Inc.**, 55 NLRB 1302, the Board held that, since the strike was called for the purpose of compelling the employer to effect a wage increase without approval of the National War Labor Board, the striking employees were not entitled to reinstatement.

In the case of **Southern Steamship Company v. N. L. R. B.**, 316 U. S. 31, this Court held that striking employees were not entitled to reinstatement to their jobs where the strike constituted mutiny within the meaning of the Criminal Code.

In the case of **National Labor Relations Board v. Fansteel Metallurgical Corp.**, 306 U. S. 240, this Court held that employees on an illegal strike are not entitled to reinstatement to their jobs.

In the case of **National Labor Relations Board v. Sands Manufacturing Co.**, 306 U. S. 332, it was held by this Court that the National Labor Relations Act does not prohibit an effective discharge of an employee for repudiation by the employee of a term of a collective agreement entered into between employer and a union representing ployees.

These cases cited by the Board have, as stated above, no bearing on the question here presented for decision. The question involved in the American News Company, Fansteel, and the Southern Steamship Co. cases was whether the striking employees remained employees for the remedial purposes specified in the Act. All of these cases concern the attempt of employees who have been guilty of violation of the law or contract to have the Board enforce against an employer the remedial provisions of the Act. They do not suggest that an employer, in addition to the prohibitions of the Act, may be held for the unfair acts of a union.

The freedom to which the Board refers is primarily freedom from employer interference, and the Board is clearly violating "the spirit of the Act" when it penalizes an employer who refuses to interfere to "protect" or dictate to the union in regard to its admission policies. And there is further violation of the spirit of an act which encourages bargaining, for the Board to sponsor a union which repudiates a bargain and even urges the employer to violate his bargain to grant a closed shop.

The Board has undertaken at length to defend the closed shop and points out its many advantages. We do not either defend or condemn the closed shop.* We simply state that it implies and authorizes exclusion.

Self preservation of the union is properly mentioned by the Board as one of the purposes of the closed shop. We are glad that the Board recognizes that there is also this institutional element in the policy. A union wants to get all the work it can for its own members, and this is especially true in times of unemployment. It must see that they are employed first. Selfishly, it may limit output if necessary. It may impose high initiation fees. It may exclude apprentices. It may exclude foreigners. We simply suggest in our brief that it may also protect the union from hostile employees by keeping them out. Undoubtedly there is an element of group loyalty in such a position but there is also group selfishness which ignores the individual.

We submit that an honest consideration of the closed shop policy requires the admission that it does involve discrimination by a union. The union has the right to determine who shall be in the bargaining unit. Non-members cannot get into the unit. If they are already in the unit and fail to join under a closed shop contract, they are out.

*That the general question is still controversial is attested by the fact that three states voted on constitutional provisions in the recent election, to prohibit closed shops; in Arkansas and Florida it was ahead; rejected in California. St. Louis Post-Dispatch, Nov. 9, 1944.

If the union expels them they are out of the unit. The Board would probably admit there are many circumstances under which a union may exclude members, such as default in dues, disloyalty, or dishonesty. Possibly the Courts would permit a union to indulge its own prejudices, such as prejudice against communists or the Ku Klux Klan, or the Chamber of Commerce!

But all of this is beside the point. The real point is that these matters are for unions to decide. They are problems for unions and not problems for employers. The purpose of the Act was to promote the institution of unionism and collective bargaining. If a union thinks that exclusion is necessary to self preservation it certainly is not for an employer to interfere.

IV.

THE BOARD OVERLOOKED THE REAL AND DECLARED MOTIVES OF THE UNION IN EXCLUDING FROM MEMBERSHIP.

Harsh methods breed harsh results. The union in this case kept over 200 employees out of employment for three and one-half months. Even women were on the picket line (R. 136). There were "shooting scrapes" (R. 185, 189). When White and some Independent members tried to get into the plant they were stopped at the gate by fifty to seventy-five members of the C. I. O. (R. 182). Mr. Davis reported stories of hardship and lack of provisions (R. 202). Harvey Dodrill, who is mentioned in the letter of the union as hostile, was active on the picket line (R. 154).

As against this background the Board constantly insists that it was some innocuous advocacy of the C. I. O. on the part of the excluded members and some abstract insistence upon exercise of their statutory rights which led to the exclusion: On page 47 the Board says, with emphasis on the word "because":

"In the instant case a minority group of employees who exercised their right under the Act to sponsor the union in the election campaign was discriminated against and the employees lost their jobs **because** they had exercised that right." (Emphasis the Board's.)

As a matter of fact there is not a scintilla of evidence that the Independent excluded these employees because of any conduct in the election campaign. The election was certified as conclusive and has been approved by the Board itself.

It is entirely possible that reconciliation of these factions was impeded by the questionable action of the Board's agents. When an investigator of the Board sought to get Thompson, the editor of the Nicholas Republican, transferred or fired from his job (R. 108), it must undoubtedly have caused resentment on his part. This circumstance, together with the Board's repudiation of its own certification of the Independent, no doubt contributed to the inflexible position of the Independent.

The Board also refuses to recognize the declared motivation of the Independent as shown by its letter about the closed shop clause (R. 287-9). This letter shows that the Independent was afraid its union would be undermined by its opponents. He refers to the hard fought and hazardous campaign prior to the election. He refers to new employees who were employed who were favorable to the interest of our opponents. The main point of the letter is clear:

"If other similar minded employees are given jobs in your plant it won't be long until our majority of 15 will be either jeopardized or overcome." * * *

"If you continue to hire new employees who are favorable to the interest of our opponents they will be in the majority before long and affiliation with our opponents will probably be their next step." * * *

"The closed shop will therefore give us some control in preventing the hiring of additional employees who are unfavorable to our interests and who would further jeopardize our majority."

It cannot be doubted on the evidence that the underlying motive of the Independent in excluding these employees was the preservation of their own union and distrust of the people it excluded. It cannot be doubted from all the evidence that the employer reluctantly discharged these employees, when they were badly needed, and did so only to avoid further stoppage and because it felt compelled to comply with a contract which the employer had with a certified union.

The Board erroneously assigns the discharge to discrimination by the employer. The Board in its present brief, however, still insists that there was evidence of discrimination on the part of the employer in making this discharge. The most notable disagreement between the Board and the petitioner on this point is with respect to evidence that the employer was advised in some way or knew the extent to which the union had excluded employees. The implication is that the exclusion of thirty-one employees was a drastic step; that if the employer knew it at the time of the discharge, he should have protested more than he did, or else be charged with complicity. It is a sort of indirect charge of conspiracy, which the Board has already disowned.

Now, it is too obvious to discuss that the employer knew of the hostility between the factions. It is not true, as stated by the Board and implied by the court, that the employer knew at the time of the discharge how extreme had been the position taken by the union in excluding thirty-one employees.

The Board misstates (as did the court below) the facts as to the employer's knowledge **at the time of the dis-**

charge of the reasons why the 43 employees had failed to qualify as members. The Board says, pages 33-34 of its brief: "Contrary to petitioner's assertions, there is substantial evidence that at the time of the discharge petitioner had ample reason to believe that the employees had been excluded from membership pursuant to the policy announced by the Independent in its letter to petitioner of February 8, 1942, and that a substantial number of the 43 had actually applied for membership and been rejected." The implication is that the company knew the details to such an extent as to have approved the action. Let us look at the record cited by the Board.

It is admitted that the discharge took place on March 17th. Mr. Wallace was called on the telephone by Mr. Phillips, the Regional Director of the Board, who reported the discharge and Mr. Wallace said he did not believe it, and investigated (R. 278). On March 20th the Board wrote to the company stating that the CIO had filed a charge of discriminatory discharge (R. 298, Respondent Wallace's Ex. 21). He asked in that letter: "We would appreciate hearing from you your version of the facts in the case."

Now, what does the Board cite as grounds for thinking that the company knew that these employees had been excluded by the union: The first citation is R. 287 to 289. This is Thompson's letter of February 28th, above discussed (R. 287), written before the discharge and not indicating that any such drastic steps would be taken.

Record p. 300 is a letter from the Company's Counsel written to the Regional Director on April 13th, almost a month after the discharge.

The next citation of authority is the Record 307-8. This is a letter of March 27th from counsel for the company to the Regional Director in response to his request for the company's version of the facts: "It is my understanding that some of the 39 to whom you refer, let us say 10 of

them, have made no application to join the union, but the balance, let us say 30, had indicated their willingness to join the Richwood union. Membership in the union is beyond the company's control." This is a letter written by the company after investigation of the facts.

The next citation is to R. page 224. This refers to a conversation between Mr. Davis, Superintendent, and Mr. McKay, agent for the Board, **in April**, where Davis said the employees would not work together and he was fearful that if the 40 employees were ordered back to work the other employees would quit. It shows no prior knowledge.

The only other reference is to the brief of the Board at pages 10 to 12 and there are no citations on that page to support the Board's contention that the company at the time it discharged the employees knew the employees had been excluded by the union.

As pointed out, the stipulation in the case (R. 98 to 100) recites the facts about the layoff. This stipulation was requested by the Board at the hearing in June. It says 12 did not apply for membership in the Independent and that 31 were voted down by the membership of the Independent. Its purpose was to avoid calling the witnesses (R. 70) to show the facts which the Board now says were known by the Company.

Dodrill stated at the hearing that all of the discharged employees were members of the CIO (R. 152). **There is no evidence in the record that the company knew this.**

As soon as the company ascertained the facts it took prompt action, under the supervision of the Board, to get the Independent to reinstate these employees. That was all it could do without being charged with interference.

The Board is quite unjustified in claiming that the company was in any way a party to the union's discrimination in the case.

The company frankly admits that it knew of the hostility between the factions. It was only too obvious. The com-

pany admits that it feared, when it made the closed shop contract, that this clause might cause trouble. That was one of the reasons for its reluctance to comply with its agreement to grant a closed shop contract, as Mr. Christmas stated in discussing the negotiation of the contract with the Independent (R. 263, 254).

V.

THE BOARD'S CHANGE OF POSITION ON ESTOPPEL.

In its final point the Board contends that if, in fact, the Independent was dominated, then the closed shop contract is invalid as a matter of law, and that is the end of the case. By making such a point the Board repudiates its prior admissions. The Board admits in the first part of its brief that certain provisions of its orders "can be sustained only if the Board acted properly in going behind the certification," or, again, on page 18, "Since the order can be sustained **in toto** only if the Board is not estopped by agreement or otherwise from resting its decision upon all facts in the case."

In other words, the Board now states that if the Independent was dominated in the fall of 1941, then the settlement agreement in the following January and the closed shop contract in the following March are invalid because of the conditions of the closed shop proviso prohibiting closed shop contracts with dominated unions. On page 72 of its brief the Board says that if it found questionable conduct it was not only permitted but was required "in vindication of the public interest" to examine in June, 1942, the character of the Independent in September or October, 1941.

This amounts to an assertion by the Board that it may renew charges which were withdrawn, and assert the illegality of a settlement which it approved, and repudiate the injunction to the employer to make a contract with the

Independent which it certified. In other words, it may do as it pleases "in the public interest."

The trouble with this position is that while the Board finds in June, 1942, that the Independent was assisted in the preceding September, it had represented by its conduct in January that the union was not dominated or assisted.

Now, let us see how far the elements of estoppel exist in this case. To what extent must the Board now repudiate representations which it made earlier and upon which the employer relied and acted?

First of all, it is notable that the Board does not anywhere deny the authority of its agents to approve settlements or to act as an arbitrator of representation, or to certify a union by consent of the parties. In fact the Board in its brief asserts the recognized custom of the Board's agents to make settlements. "Settlements are generally arranged by the Board's agents working in the field" (Brief p. 21). The practice has been approved by the courts (Brief p. 23). The Board is proud of the extensive use of settlements and the results accomplished (Footnote p. 21).

It should also be noted that the Board does not accuse the employer of concealment or misrepresentation of the facts or of recognizing the Independent prior to the settlement or any fraud whatever.

Now, under those conditions, what representations did the Board make upon which the employer acted and which the Board now repudiates?

1. In January, according to the policy which the Board has announced in its 8th Annual Report (see Pet. Brief p. 28), the Board's agents were presumably "satisfied after considering all the evidence * * * that an election free from all employer compulsion, restraints and interference can be held." The Board had investigated the charge which was withdrawn. (If anything it was the Board

which concealed the facts; its investigator in conference with the employer and its foremen in November, 1941, had refused "to lay his cards on the table" [R. 294].)

2. The Board knew that a closed shop contract would result from the certification which it undertook because that was one of the terms of the settlement. When it undertook to certify it, it represented by its conduct that both unions were eligible for a closed shop contract.

3. The Board has by its conduct admitted that Thompson was responsible for the discrimination. Its agents, after the charges were filed, approached Thompson's employer in order to induce Thompson to act (R. 108). It attempted to induce Thompson's employers to transfer or discharge Thompson as editor of the Nicholas Republican.

4. When the employer, just before the hearing, stated his willingness to re-employ these employees and suggested that the Board and the Independent confer to settle the case, the Board conferred with the Independent as the responsible party and failed to reach an agreement. The employer was not even called into the conference (R. 68-70).

To hold the employer responsible in this case would require this court to say to the Board (1) you may represent to the employer that a fair election can be held and then ignore the election; (2) you can represent to the employer that a closed shop contract will be legal and then call it an unfair practice; (3) you can represent to the employer that a union is a certified bargaining agent and after he has changed his position you can recall your certification; (4) you can act as an arbitrator of representation under a contract between the parties and then repudiate the arbitration. Then the Court adds: In respect to all this conduct when you come before the court, the court will give you the benefit of all doubts by sustaining your finding of facts if any substantial evidence is available to support them.

The employer has but one recourse, namely, to plead abuse of administrative discretion. It relies upon the fundamental principles of estoppel. No one can state a fact even under mistake as to the fact and thereby induce someone else to act upon such fact, and thereafter assert its untruth. That principle should apply in the absence of fraud or conspiracy as in this case. The facts do not permit any charge of concealment or of fraud or willful violation of the act. The settlement was a reasonable one. The employer never recognized either union until the settlement.

It is submitted that the Board's conduct in this case will not permit it to claim that a closed shop contract which it approved was void because of facts which it knew at the time. The Board should not be permitted, after approving a contract which required a closed shop and required the employer to deal with the union, and in effect to make such a contract, to now assert that the employer's compliance with the Board's injunctions and with its own contract is an unfair labor practice. The Board cannot be heard to say that a union which it considered eligible to contract for a closed shop contract is now ineligible, after it certifies that union as an exclusive bargaining agent for the purpose of making a closed shop contract.

Respectfully submitted,

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